Citation: *RJ v Canada Employment Insurance Commission*, 2021 SST 927

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Claimant:	R. J.
Commission:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (434912) dated October 14, 2021 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	December 2, 2021
Hearing participant:	Claimant
Decision date:	December 14, 2021
File number:	GE-21-2217

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Claimant has shown that she was available for work while in school. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from September 28, 2020 to April 23, 2021, because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I have to decide whether the Claimant has proven that she was available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[5] The Commission says that the Claimant wasn't available because she was in school full-time.

[6] The Claimant disagrees and says that she was actively looking for jobs after losing her former job. She said that she was willing to work around her school schedule and not limit her self to only 20 hours of work per week.

Matter I have to consider first

The Claimant didn't send the Commission's reconsideration decision

[7] The Claimant has to send the Tribunal a copy of the Commission's decision with her notice of appeal.[1] She did not do so. I have a copy of the Commission's file that has this decision. So, I do not need the Claimant to send it.[2]

[1] Paragraph 24(1)(b) of the *Social Security Regulations* .
[2] Paragraph 3(1)(b) of the *Social Security Regulations.*

Issue

[8] Was the Claimant available for work while in school?

Analysis

[9] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[10] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4] I will look at those criteria below.

[11] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[5] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

[12] The Commission decided that the Claimant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

[13] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[7] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

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[3] See section 50(8) of the *Employment Insurance Act* (Act).
[4] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[5] See section 18(1)(a) of the Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[14] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

Presuming full-time students aren't available for work

[15] The presumption that students aren't available for work applies only to full-time students.

– The Claimant doesn't dispute that she is a full-time student

[16] The Claimant agrees that she is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time.

[17] The presumption applies to the Claimant.

– The Claimant is a full-time student

[18] The Claimant is a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[19] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[8] Or, she can show that there are exceptional circumstances in her case.[9]

[20] The Claimant says she called the Commission before applying for EI benefits to make sure she was eligible for benefits so that what's happening to her now would not happen. She says she was able to work around her classes and would work as many hours as she could.

[21] The Commission says that the Claimant's unwillingness to look for and accept work that conflicted with her school schedule was an undue restriction.

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[8] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[22] I find that in the unique circumstances created by the COVID-19 pandemic with on-line asynchronous classes, the Claimant has rebutted the presumption of non-availability.

[23] The Claimant testified that she's currently in her fourth year of a degree program. For the period in question, she was in her third year. She said that her classes in her third year were almost exclusively online. Specifically, in the fall, she was on campus for a few hours a week, but after three weeks when once COVID-19 got worse, she attended classes online only.

[24] For both semesters in her third year, the Claimant had a mix of synchronous and asynchronous classes. Given her schedule, the Claimant said that she thought she could work the equivalent of full-time hours, outside the traditional 9:00 a.m. to 5:00 p.m. work hours.

[25] I asked the Claimant if she has a history of working full-time while in school. She said that she does not, but she has a history of working as many hours as her previous employer would give her in a week. She named a previous retailer where she worked in her first and second year. She worked during the week and on weekends, between 25 and 30 hours a week outside midterm or final exam seasons.

[26] I accept as fact that the Claimant has worked as much as she could since her first year at the college where she is studying. She testified that she couldn't survive without working and bringing home an income since she lives on her own. I commend her for working while pursuing her field of study. However, I don't find that she has shown that she has a history of full-time work while studying.

[27] The Claimant detailed the hours of the day and days of the week she thought that she would have been available for work in her third year of study. For both semesters, she listed days and times around her school schedule. This is consistent with her statement to the Commission that she was looking for part-time work around her school schedule. However, she included days and hours on which she had asynchronous classes in her availability. I find that because the Claimant had been

working between 25 and 30 hours a week before her lay-off, being able to work when she would otherwise have had to attend classes is an exceptional circumstance. I find that this is enough to rebut the presumption of non-availability.

[28] The Claimant has rebutted the presumption that she was unavailable for work.

– **The presumption is rebutted**

[29] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant is actually available.

Reasonable and customary efforts to find a job

[30] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[10]

[31] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[11] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[32] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[12]

- assessing employment opportunities
- applying for jobs
- attending interviews

[33] The Commission says that the Claimant didn't do enough to try to find a job.

[34] The Claimant disagrees. She was using Indeed and a school-provided website to look for jobs in her area. She sent the Commission a list of jobs she had applied for

[10] See section 50(8) of the Act.
[11] See section 9.001 of the Regulations.
[12] See section 9.001 of the Regulations.

from the time she lost her former job. The Claimant says that her efforts were enough to prove that she was available for work.

[35] I find that that the Claimant has shown that she was making reasonable and customary efforts to find a job.

[36] The Claimant completed two training questionnaires. In both, she said that she had been making efforts to find work since becoming unemployed. She consistently maintained that she had been actively applying for jobs.

[37] The Commission asked the Claimant to send them a record of her job search efforts. The Claimant did so. The job search record shows that she applied for 18 jobs from July 27, 2020 to March 29, 2021. It also shows that she attended a six-week co-op class. She says the class specialized in résumé and cover letter writing, and how to be successful in an interview. The Claimant attended an interview on April 1, 2021, and accept the position offered.

[38] I asked the Claimant about not having applied for any jobs in November 2020, December 2020 and January 2021. She explained that because of pandemic-related lockdowns, restaurants and the malls were closed, and these were the kinds of jobs she would be looking for. I find that this is a reasonable explanation.

[39] In spite of the gap in job applications, I find that the Claimant's efforts went beyond just applying for jobs. Her efforts included looking for jobs, attending classes to improve her chances of getting a job, applying for jobs and attending an interview that led to an accepted job offer. I am satisfied that the Claimants efforts were sustained and enough to show that she made reasonable and customary efforts to find a job.

[40] The Claimant has proven that her efforts to find a job were reasonable and customary.

Capable of and available for work

[41] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[13] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[14]

a) She wanted to go back to work as soon as a suitable job was available.

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[42] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[15]

– Wanting to go back to work

[43] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[44] As noted above, the Claimant lost her job when the company at which she worked closed due to the pandemic. From that time, the Claimant tried to get another job. She testified that she needed to work to support herself since she lives on her own. I have no reason to doubt her testimony. I find that her actions in trying to find a job support her statement that she wanted to work. For this reason, I am satisfied that she has shown that she wanted to go back to work as soon as a suitable job was available.

– Making efforts to find a suitable job

[45] The Claimant has made enough effort to find a suitable job.

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[13] See section 18(1)(a) of the Act.
[14] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[15] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[46] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[16]

[47] The Claimant's efforts to find a new job included looking on internet websites fro jobs, attending a co-op class to improve her chances of getting a job, applying for jobs and attending an interview. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[48] The Commission said that the Claimant made only minimal efforts to find a suitable job. The Claimant testified that she was trying really hard to find a job. She said that the Commission should have considered the provincial lockdown. She added that the jobs she would have been looking for were in malls and restaurants, which were impacted by the lockdown.

[49] I find that the Claimant's efforts were enough to meet the requirements of this second factor, especially in view of the challenges the pandemic brought. The Claimant looked and applied for many jobs in a sustained way. In addition, she engaged in activities of the type listed in the law. From this, I find that the Claimant was making efforts to find a suitable job and succeeded in doing so.

– **Unduly limiting chances of going back to work**

[50] The Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[51] The Claimant says she hasn't done this because she was willing to work around her synchronous schedule, and not limit herself to 20 hours a week. She said that she could potentially work full-time hours if the schedule was right.

[52] The Commission says that the Claimant was unwilling to look for and accept a job that conflicts with her school schedule. They say that this was an undue restriction.

[16] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

[53] I asked the Claimant about the Commission's submission. She replied that school was important to her and her willingness to work around her schedule should be applauded. The Claimant did say that she wouldn't take a job that conflicted with her school schedule. However, she attended a mix of synchronous and asynchronous classes in the period in question.

[54] I find that the Claimant did not set any personal conditions that might have unduly limited her chances of going back to work. She had worked on average 20 to 35 hours weekly while going to school. I find given her history of part-time work around her school schedule that it was reasonable for her to look for the same type of work in the retail and restaurant industry.

[55] The Claimant lost her job because of the pandemic, and may have had more difficulty getting a replacement job for the same reason. I have already found that being able to work when she would otherwise have had to attend classes is an exceptional circumstance that rebuts the presumption of non-availability. I find in these unique circumstances, the Claimant saying that she would work around her school schedule did not unduly limit her chances of going back to work.

– **So, was the Claimant capable of and available for work?**

[56] Based on my findings on the three factors, I find that the Claimant has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[57] The Claimant has shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[58] This means that the appeal is allowed.

Audrey Mitchell

Member, General Division – Employment Insurance Section